Schweizerische Eidgenossenschaft
Confédération suisse
Confederazione Svizzera
Confederaziun svizra

Federal Department of Finance FDF

State Secretariat for International Financial Matters SIF

April 2015

Technical explanation

Federal Act of 12 December 2104 for Implementing the Revised Financial Action Task Force (FATF) Recommendations of 2012

Dr Riccardo Sansonetti

Head of the section Financial Crime

State Secretariat for International Financial Matters, Berne

Introduction

Switzerland attaches great importance to the integrity of its financial centre. Over the past few decades, Switzerland has been gradually developing a robust and comprehensive system for combating money laundering which combines preventive and repressive measures. The international standards to combat money laundering and terrorist financing underwent a complete overhaul in the last few years, and the revision was completed in February 2012. Swiss legislation is already broadly in line with the new Financial Action Task Force (FATF) standards. These standards, combined with the deficiencies identified during the FATF evaluation of Switzerland in 2005, caused the legislator to adopt the Federal Act for Implementing the Revised Financial Action Task Force (FATF) Recommendations of 2012 on 12 December 2014 (FF 2014 9465-9482). This law is the result of an extensive consultation of interested parties and the dispatch of 13 December 2013 concerning the implementation of the revised recommendations of the Financial Action Task Force (FATF) of 2012 (FF 2014 585-700), which was discussed intensively by Parliament. The law adopted by the Federal Assembly on 12 December 2014 introduces around fifty new provisions on the eight topics mentioned below into eight federal laws (Swiss Civil Code, Swiss Code of Obligations, Debt Enforcement Bankruptcy Act, Swiss Criminal Code, Administrative Criminal Law Act, Collective Investment Schemes Act, Anti-Money Laundering Act and Intermediated Securities Act).

1. Registration of ecclesiastical and family foundations

The obligation to enter foundations in the commercial register has been extended via an amendment of the Civil Code to cover all foundations, including ecclesiastical and family foundations. Ecclesiastical and family foundations have five years from the time of the law's entry into force to be registered (Art. 6b para. 2bis of the final title of the CC). Regarding the requirements for entering ecclesiastical foundations in the commercial register, the Federal Council will take their particular circumstances into account.

2. Beneficial owner

The FATF recommendations require the financial intermediary to systematically identify the beneficial owner of a business relationship and verify his identity by means of a risk-based approach. The law now expressly stipulates in the key provision on the identification of the beneficial owner (Art. 4 para. 1 of the Anti-Money Laundering Act, AMLA) that the financial intermediary has to identify the beneficial owner with the due diligence required by the circumstances. The financial intermediary must obtain a written declaration indicating the natural person who is the beneficial owner particularly when the contracting party is not the beneficial owner or when there is doubt in this respect, and always when the contracting party is a domiciliary company or a legal entity that is active operationally (Art. 4 para. 2 of the AMLA). Provision is made for an exception regarding the identification of beneficial owners when the contracting party is a listed company or an affiliate in which such a company has a majority stake (Art. 4, end of para. 1 of the AMLA). Finally, the law gives a definition of who the beneficial owners of legal entities that are active operationally are (Art. 2a para. 3 of the AMLA).

3. Transparency regarding legal entities, including companies with bearer shares

The measures taken by the legislator in the area of transparency regarding legal entities are in response to the revised FATF standards as well as the deficiencies identified during the last FATF evaluation of Switzerland. In particular, the revised FATF standards require measures aimed at ensuring transparency regarding unlisted companies that issue bearer shares, as well as the identification of the beneficial owner of legal entities. With respect to bearer shares, the measures introduced with the new law are also aimed at meeting the requirements of the Global Forum on Transparency and Exchange of Information for Tax Purposes, which insist on the identification of every owner of such shares. To this end, the new law introduces a disclosure obligation for holders of bearer shares as well as for beneficial owners once a certain stake has been exceeded in the case of unlisted companies. The new legislation gives companies with bearer shares four alternatives:

1) The shareholder discloses the acquisition of bearer shares to the company; and if the shareholder's stake reaches or exceeds 25% of the share capital or voting rights, the beneficial owner of the shares has to be disclosed. The shareholder has to inform the company of his full name, or company name, as well as his address (Art. 697i of the CO). All shareholders who reach or exceed the 25% threshold have to inform the company of the full name and address of the natural person on whose behalf they are ultimately acting, i.e. the beneficial owner (Art. 697j of the CO). New shareholders have one month to make these disclosures, failing which they may not exercise their membership rights and their property rights become void (Art. 697m of the CO). With regard to shareholders holding bear shares when the law enters into force, this period is extended to six months (Art. 3 of the transitional provisions of the amendment of 12 December 2014).
2) The shareholder disclosure is made to a financial intermediary as defined in the AMLA (Art. 697k of the CO) rather than to the company.
3) The simplified conversion of bearer shares into registered shares (Art. 704a of the CO).
4) The issuance of bearer shares in the form of intermediated securities. In this last case, the central securities depository must be designated by the company and be in a position to access the identification data collected by the financial intermediary that identified the shareholder (Art. 23a of the Intermediated Securities Act).

The registered shareholders of unlisted companies and partners of limited liability companies are also subject to the obligation to disclose the beneficial owners as soon as a shareholding of 25% is reached or exceeded (Art. 697j and Art. 790a of the CO).

4. Serious tax crimes as predicate offences to money laundering

The FATF has added "tax crimes (related to direct and indirect taxes)" to its list of offences which must mandatorily constitute predicate offences to money laundering, but without actually defining these offences. For implementation in domestic law, countries can restrict themselves to offences considered as serious under national law. As far as indirect taxation is concerned, the new law extends the predicate offence already in force since 1 February 2009 (aggravated tax fraud under Art. 14 para. 4 of the Administrative Criminal Law Act, ACLA) – which circumscribes a felony – beyond cross-border goods traffic in order to cover other taxes levied by the Confederation, especially VAT on domestic deliveries and services, or withholding tax.

In the case of direct taxation, rather than modifying tax legislation in order to enshrine a felony there, the new law amends the Criminal Code's approach regarding predicate offences to money laundering. The legislator decided that also tax fraud in accordance with Article 186 of the Direct Federal Taxation Act (DFTA) or Article 59 of the Federal Act on the Harmonisation of Direct Taxation at Cantonal and Communal Levels (DTHA) – which is considered a misdemeanour – is now considered as predicate offences to money laundering if the amount of tax evaded exceeds CHF 300,000 per tax period. This solution has the advantage of being based on current criminal law relating to tax offences and not being prejudicial to its revision. The threshold of more than CHF 300,000 in evaded tax aims to limit the new predicate offence to serious cases. The Federal Council and the legislator believe that with such a sum the damage to the State’s pecuniary interests is great enough to warrant classification as a predicate offence to money laundering.

5. Politically exposed persons (PEPs)

The revision of the FATF recommendations has introduced an obligation to identify domestic PEPs and persons exercising (or having previously exercised) an important function at or on behalf of an international organisation according to the principle of the risk-based approach. The due diligence obligations applicable to all types of PEPs must equally apply to members of the PEP's family and close associates. The AMLA now contains a definition of foreign PEPs and makes it clear that business relationships with these people or their close associates are considered as business relationships with a higher risk in any case (Art. 2a paras. 1 and 2 and Art. 6 para. 3 of the AMLA). These provisions were previously contained in the FINMA Anti-Money Laundering Ordinance. Moreover, the legislator added to the AMLA a definition of domestic PEPs who occupy senior public positions at federal level and PEPs in international organisations or in international sporting federations. The legislator clarified that these include all non-governmental organisations recognised by the International Olympic Committee (IOC) that administer sports at world level, as well as the IOC itself (Art. 2a para. 5 of the AMLA). For these newly created PEP categories, risk-based due diligence measures have been introduced, which means that, unlike foreign PEPs, these categories are not considered a priori as business relationships with a higher risk.

6. Regulations on cash payments for purchases of both movable and immovable property

During its last evaluation of Switzerland in 2005, the FATF identified deficiencies concerning the requirement for certain professions outside the financial sector to comply with anti-money laundering regulations. Real estate is one of these sectors. At the national level, parliamentary initiatives repeatedly called for the AMLA regulations to be extended to real estate agents and notaries as well. The legislator decided to impose due diligence obligations on natural persons and legal entities trading professionally in movable or immovable property that receive cash payments exceeding CHF 100,000 ("traders" in accordance with Art. 2 para. 1 letter b of the AMLA). The due diligence obligations envisaged include verification of the identity of the contracting party, identification of the beneficial owner, preparation and safekeeping of documents, clarification of the background and purpose of the trade when the transaction seems unusual or there are grounds to suspect that the cash used to pay originates from a felony or an aggravated tax misdemeanour, and the obligation to report well-founded suspicions (Art. 8a paras. 1 and 2 and Art. 9 para. 1bis of the AMLA). These obligations will be fleshed out in a Federal Council ordinance (Art. 8a para. 5 of the AMLA). Traders can now choose between having payments made through a financial intermediary or receiving cash payments exceeding CHF 100,000 themselves and applying these due diligence obligations (Art. 8a para. 4 of the AMLA). Traders are required to appoint auditors to check compliance with these obligations (Art. 15 of the AMLA).

7. Suspicious activity reporting system and MROS powers

The FATF requires the establishment of an effective system for reporting suspicious activity in which the Financial Intelligence Unit (FIU), such as the Money Laundering Reporting Office Switzerland (MROS), plays a key role. According to the FATF standards, the analysis of suspicious activity reports conducted by the FIU must add value to the information that it receives or already has in its possession. The FIU must have enough time to conduct its analyses and play a truly supportive role and act as a filter for the criminal prosecution authorities.

The amendment of the AMLA of 21 June 2013, which entered into force on 1 November 2013, gave the MROS new powers to obtain additional information from financial intermediaries. It also allows the MROS to exchange financial information with its foreign counterparts under certain conditions and to regulate the specifics regarding collaboration with them by entering into MoUs. The law of 12 December 2014 contains new measures aimed at both making the suspicious activity reporting system more effective in line with the FATF's requirements and facilitating the work of reporting entities that are financial intermediaries.

The legislator decided on several adjustments to the suspicious activity reporting system, including the elimination of the five-day freeze automatically triggered by the reporting of suspicions by a financial intermediary. This was a Swiss peculiarity criticised by the FATF that created difficulties for financial intermediaries. The law now provides for a period of 20 working days for MROS analysis of suspicious activity reports (Art. 9 para. 1 and Art. 23 para. 5 of the AMLA). All client orders can be executed during MROS analysis. If after conducting its analysis the MROS decides to forward the report to the competent criminal prosecution authority, the financial intermediary is notified accordingly and has to automatically freeze the assets concerned for a maximum of five working days. The same procedure applies in the event of

suspected terrorist financing, except in the case of matching with a foreign list of terrorists. In this case, positive law is maintained, i.e. the financial intermediary's report automatically triggers a five-day freeze (Art. 9 para. 1 letter c and Art. 10 para. 1bis of the AMLA; see also section 8). Regarding the ban on informing the client about a suspicious activity report, the legislator has introduced an exception for cases where financial intermediaries have to preserve their own interests within the framework of civil, criminal or administrative proceedings. In such cases, they may inform the client that a report has been submitted to the MROS.

To ensure high-quality analyses, the MROS must have access to the widest possible range of financial and administrative information, or material originating from criminal prosecution authorities. For this reason, the legislator has extended internal administrative assistance to enable the MROS to obtain, upon request, all the information it deems necessary for its analysis of suspicious activity reports from other federal, cantonal and communal authorities (Art. 29 para. 2 of the AMLA).

8. Targeted financial sanctions related to terrorism and terrorist financing

The legislator has introduced a formal legal basis for federal authorities' handling of foreign lists created in accordance with Security Council resolution 1373. The law makes provision for foreign lists of persons and organisations that are sent to Switzerland to be examined from a human rights perspective and in terms of the rule of law when appropriate. After the interested departments have been heard, the Federal Department of Finance decides whether to transmit the lists to the supervisory authorities, i.e. FINMA and the Federal Gaming Board. The supervisory authorities for their part acquire the formal power to forward these lists to financial intermediaries and self-regulatory organisations. The legislator has also defined the obligations of the financial intermediaries to which the supervisory authorities have transmitted these lists. If on the basis of their clarifications financial intermediaries know or presume that the data concerning a person or organisation on such a list matches with that on a person involved in a business relationship or transaction, they must inform the MROS and immediately freeze the assets (Art. 9 para. 1 letter c and Art. 10 para. 1bis of the AMLA).

Conclusion

Swiss legislation is broadly in line with the new FATF standards. However, the adjustments contained in the federal act of 12 December 2014 are essential for effectively implementing international standards. This will enable Switzerland to show the Global Forum on Transparency and Exchange of Information for Tax Purposes the progress made from mid-2015 as well as demonstrate the compliance of its anti-money laundering and counter-terrorist financing system during the FATF's fourth evaluation of Switzerland, which will commence in 2015.